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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

8 ROGER D. ERICKSON,

9 Plaintiff,

10 v.

11 MICHAEL J. ASTRUE, Commissioner of the  
12 Social Security Administration,

13 Defendant.

Case No. C11-410-JCC-BAT

**REPORT AND  
RECOMMENDATION**

14 Roger Driscoll Erickson seeks review of the denial of his Disability Insurance Benefits  
15 application. In his opening brief, he contended the ALJ erred by improperly evaluating the  
16 opinions of Dr. Glenn Sternes, Ph.D., and improperly discounting Mr. Erickson's credibility.  
17 Dkt. 11. In response, the Commissioner filed a motion conceding the ALJ erred in evaluating  
18 Dr. Sternes' opinion and arguing the matter should be remanded for further administrative  
19 proceedings. Dkt. 17. Mr. Erickson replied arguing the matter should be remanded for an award  
20 of benefits. Dkt. 18. As discussed below, the Court recommends the case be **REVERSED** and  
21 **REMANDED** for further administrative proceedings.

22 **FACTUAL AND PROCEDURAL HISTORY**

23 Mr. Erickson is currently 62 years old, completed the 10th grade, and has worked as a

1 truck driver, infantry man, and laborer.<sup>1</sup> On September 11, 2007, he applied for benefits,  
2 alleging disability as of January 1, 1983. Tr. 145. His application was denied initially and on  
3 reconsideration.<sup>2</sup> The Social Security Administration has established a five-step disability  
4 evaluation process.<sup>3</sup> Utilizing this process the ALJ conducted a hearing on November 5, 2009,  
5 and found at **step one** that Mr. Erickson had not worked since January 1, 1983, and last met the  
6 insured status requirements of the Social Security Act on June 30, 1985. Tr. 16. The ALJ found  
7 at **step two** that through the date last insured, Mr. Erickson did not have any severe impairments  
8 or combination of impairments and therefore was not disabled. *Id.* As the Appeals Council  
9 denied Mr. Erickson's request for review, the ALJ's decision is the Commissioner's final  
10 decision. Tr. 1.

## 11 DISCUSSION

### 12 A. Remand standard

13 The parties agree the ALJ erred in evaluating the opinions of Dr. Glenn Sternes, Ph.D.,  
14 and that the matter should therefore remanded. The sticking point is whether the matter should  
15 be remanded for further proceedings or for an award of benefits. The Court may remand for an  
16 award of benefits where "the record has been fully developed and further administrative  
17 proceedings would serve no useful purpose."<sup>4</sup> This occurs when: (1) the ALJ has failed to  
18 provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no  
19 outstanding issues that must be resolved before a determination of disability can be made; and  
20 (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he

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21 <sup>1</sup> Tr. 145, 163, 166.

22 <sup>2</sup> Tr. 97-99.

23 <sup>3</sup> 20 C.F.R. §§ 404.1520, 416.920.

<sup>4</sup> *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)).

1 considered the claimant's evidence.<sup>5</sup> As discussed below, under this standard, the Court  
2 concludes the matter should be remanded for further proceedings.

3 **B. Evaluation of Dr. Sternes' opinions**

4 Mr. Erickson's arguments that this case should be remanded for an award of benefits rest  
5 heavily on Dr. Sternes' opinions. Dr. Sternes is a reviewing doctor who has never treated or  
6 examined Mr. Erickson and who testified as a medical expert at the hearing. Tr. 69. He testified  
7 on direct examination there was insufficient evidence in the medical record to render "any kind  
8 of diagnosis or conclusions" about Mr. Erickson's medical impairments prior to 1985. Tr. 70.  
9 He also testified that based on the medical record, Mr. Erickson did not have any severe  
10 impairments before June 30, 1985. *Id.* On cross-examination, Dr. Sternes testified he had no  
11 reason to question Dr. Plattner's opinion that Mr. Erickson had PTSD in 1990 and 1999. Tr. 76-  
12 77. Mr. Erickson's lawyer also asked Dr. Sternes the following questions regarding the  
13 testimony Mr. Erickson gave at the hearing and Dr. Stearnes gave the following answers:

14 Q: Would you agree that the symptoms he [Mr. Erickson]  
15 described, specifically hypervigilence, sleep disturbance, bad  
16 dreams, social isolation, irritability, anger, insistence on doing  
things the right way, which veterans gets to say his way, that these  
are symptoms of PTSD?

17 A: Yes, Sir.

18 Q: So do you not agree that on a more probable than not basis  
19 then the veteran was having these symptoms of PTSD, that he had  
PTSD prior to 1985; it was just not diagnosed?

20 A: Yes.

21 Q: Now the veteran explained that he had great difficulty  
22 following a supervisor's instructions; that he insisted on doing  
things the right way, which he related to what happened to him in  
23 Vietnam where he would follow orders and people would die, even

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<sup>5</sup> *Id.* at 1076-77.

1           though he knew the orders were wrong. Do you have any reason  
2           to doubt that were he on a job prior to 1985 the same thing would  
3           have had happened?

4           A: Yes

5           Q: You have reason to doubt that?

6           A: No, sir.

7           Q: So you think that's more likely than not what would have  
8           happened?

9           A: Yes.

10          Q: And you heard his testimony about if he were doing an  
11          assembler job and he would see people walking toward him.  
12          Because of his hypervigilance, he would stop what he was doing  
13          and watch the people. So you have any reason to doubt that would  
14          happen if he were on a job prior to 1985?

15          A: No.

16          Tr. 78-79.

17          Dr. Sternes also testified that based on Mr. Erickson's testimony, a person with the limits  
18          Mr. Erickson described would have moderate or severe non-exertional limitations but would not  
19          meet the criteria for a listed impairment. *See* Tr. 80-85.

20          Mr. Erickson argues Dr. Sternes' testimony establishes (1) Mr. Erickson's PTSD is a  
21          severe impairment, for purposes of a step-two determination; (2) Mr. Erickson's PTSD caused  
22          significant functional limitations prior to 1985, the date last insured; (3) Mr. Erickson was under  
23          disability due to PTSD prior to the his last date insured; and (4) the Court should therefore  
24          remand the matter for an award of benefits. The record does not support these arguments.

25          First, Dr. Sternes' testimony is not sufficient to establish, for purposes of a step-two  
26          determination, that Mr. Erickson's PTSD was a severe impairment during the relevant time  
27          period, i.e., before June 1985. At step two of the sequential evaluation, the ALJ determines

1 whether a claimant suffers from a “severe” impairment—one that significantly limits his physical  
2 or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520, 416.920(c). To satisfy step  
3 two’s requirement of a severe impairment, the claimant must prove the existence of a physical or  
4 mental impairment by providing medical evidence consisting of signs, symptoms, and laboratory  
5 findings; the claimant’s own statement of symptoms alone will not suffice. 20 C.F.R. §§  
6 404.1508, 416.908; *see also* Social Security Ruling (SSR) 96-4p<sup>6</sup> (the existence of a medically  
7 determinable mental impairment must be established by medical evidence consisting of signs,  
8 symptoms, and laboratory findings; under no circumstances may the existence of an impairment  
9 be established on the basis of symptoms alone).

10 Hence, at step two, regardless of how genuine an individual’s complaints are, the  
11 existence of a medically determinable mental impairment cannot be established in the absence of  
12 objective medical abnormalities, i.e., medical signs and laboratory findings. If there are no  
13 medical signs or laboratory findings to substantiate the existence of a medically determinable  
14 mental impairment, the individual must be found not disabled at step two of the sequential  
15 evaluation process. *See* SSR 96-4p; *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005).

16 Here, Dr. Sternes testified that based on the medical record, Mr. Erickson did not have  
17 any severe impairments before June 30, 1985. *Id.* Mr. Erickson has not challenged this opinion.  
18 Hence the medical record shows an absence of objective medical abnormalities; i.e., medical  
19 signs and laboratory findings to support a finding that Mr. Erickson’s PTSD was a severe  
20 impairment prior to June, 30 1985. It is true Mr. Erickson testified that his PTSD symptoms  
21 were disabling prior to 1985, and that Dr. Sternes agreed that a person with such symptoms

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22 <sup>6</sup> “SSRs do not have the force of law” but “represent the Commissioner's interpretation of the  
23 agency's regulations.” *Holohan v. Massanari*, 246 F.3d 1195, 1202 n.1 (9th Cir. 2001).  
However, they are given “some deference” as long as they are consistent with the Social Security  
Act and regulations. *Id.* (citation omitted).

1 would have moderate to severe limitations. But as discussed above, a claimant's complaints  
2 alone are insufficient to prove the existence of a severe impairment during the relevant time  
3 period—prior to the last date insured, June 1985.

4 Although the opinions Dr. Sternes gave, based on Mr. Erickson's complaints, are  
5 insufficient to support a finding PTSD was a severe impairment prior to 1985, there is other  
6 evidence in the record that should be considered. The medical record shows Dr. Plattner  
7 diagnosed Mr. Erickson as suffering from PTSD. Dr. Plattner examined Mr. Erickson in July,  
8 1990 and in May, 1997. Tr. 714, 742. In 1990, Dr. Plattner opined Mr. Erickson had dysthemia  
9 but did not meet the criteria for a PTSD diagnoses. Tr. 744. In 1997, Dr. Plattner opined his  
10 1990 opinion was in error and that Mr. Erickson met the criteria for PTSD. Tr. 718-19. Dr.  
11 Plattner also opined in 1997 that Mr. Erickson's PTSD was severe and that he would not be able  
12 to sustain a 40 hour workweek. Tr. 719. Dr. Plattner's opinions thus show that since 1990, Mr.  
13 Erickson's PTSD was a severe impairment for purposes of step-two.

14 While Dr. Plattner's opinions indicate that after 1990 Mr. Erickson's PTSD was a severe  
15 impairment, it is not clear whether the doctor was also of the opinion that PTSD was a severe  
16 impairment prior to June 30, 1985, the relevant time period in this case, and if so, what if any  
17 limitations PTSD caused during that time frame. Rather, the record shows Dr. Plattner did not  
18 venture an opinion as to whether Mr. Erickson's PTSD was a severe impairment prior to June  
19 1985. And, Mr. Erickson has not claimed Dr. Plattner found Mr. Erickson's PTSD to be a severe  
20 impairment prior to 1985, and that the ALJ erred in failing to so find.

21 At best, all Mr. Erickson has argued is Dr. Plattner did not opine Mr. Erickson's PTSD  
22 "did not exist prior to Erickson's last date insured." *Id.* But an argument is not the same as a  
23 fact established by substantial evidence of record. Mr. Erickson's argument thus is not an

adequate substitute for actual medical evidence establishing Mr. Erickson's PTSD was a severe impairment during the relevant time period. In any event, the argument is made in the negative and therefore does not prove the positive—that Mr. Erickson's PTSD was a severe impairment prior to 1985 that rendered him disabled.

Hence, on the present record, the Court cannot say a reasonable ALJ would be required to find Mr. Erickson disabled after considering all of the evidence of record. To the contrary, the present record suggests that it would not be unreasonable for an ALJ to conclude there is insufficient evidence to substantiate the existence of PTSD during the relevant time period as a severe impairment at step two of the sequential evaluation process. As such, there are reasons to find that during the relevant time period, Mr. Erickson did not have a severe impairment that rendered him disabled. Nonetheless, the Court concludes it would be prudent to remand the matter for further proceedings in light of the ALJ's conceded errors, rather than simply affirming the ALJ's decision.

In sum, the Court recommends this matter be remanded for further proceedings. The ALJ erred in evaluating Dr. Sternes' opinions and there remain outstanding issues that must be resolved before a determination of disability can be made.

**C. The ALJ's evaluation of Mr. Erickson's credibility**

Given the Commissioner's concession that the ALJ erred in evaluating Dr. Sterne's opinions, the ALJ on remand should also reevaluate Mr. Erickson's credibility with respect to his claims that PTSD renders him disabled.

**CONCLUSION**

For the foregoing reasons, the Court recommends the Commissioner's decision be **REVERSED** and the case be **REMANDED** for further administrative proceedings. On remand,

1 the ALJ should (1) reevaluate the medical evidence regarding Mr. Erickson's PTSD including  
2 the opinions of Dr. Plattner and Dr. Sternes; (2) develop the record as it pertains to PTSD; (3)  
3 complete the five-step disability evaluation process as deemed necessary, limited to whether Mr.  
4 Erickson was under disability due to PTSD. Mr. Erickson did not assign error to the ALJ's  
5 evaluation of other impairments that Mr. Erickson claimed he had such as Hepatitis C,  
6 depression and chronic back pain. Tr. 17. Accordingly, the ALJ's determinations regarding  
7 those impairments should remain undisturbed and the scope of remand should be limited to  
8 reevaluating PTSD.

9       Objections if any to this Report and Recommendation must be filed and served no later  
10 than **October 12, 2011**. If no objections are filed, the matter will be ready for the Court's  
11 consideration on that date. If objections are filed, any response is due within 14 days after being  
12 served with the objections. A party filing an objection must note the matter for the Court's  
13 consideration 14 days from the date the objection is filed and served. Responses to objections  
14 must be filed no later than 14 days after being served with objections. Objections and responses  
15 shall not exceed twelve pages. The failure to timely object may affect your right to appeal.

16       DATED this 28th day of September, 2011.

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BRIAN A. TSUCHIDA  
United States Magistrate Judge  
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